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IN THE

Supreme Court of the United States

October Term, 1956.

No. 780

LEONORA ROMANO, PASQUALE ROMANO and ROCCO CARUSO, Executors and Trustees of the Estate of Antonio Maglio, Deceased,

Plaintiffs,

LEONORA ROMANO,

Plaintiff-Petitioner,

vs.

LOUISE MAGLIO, et als.,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

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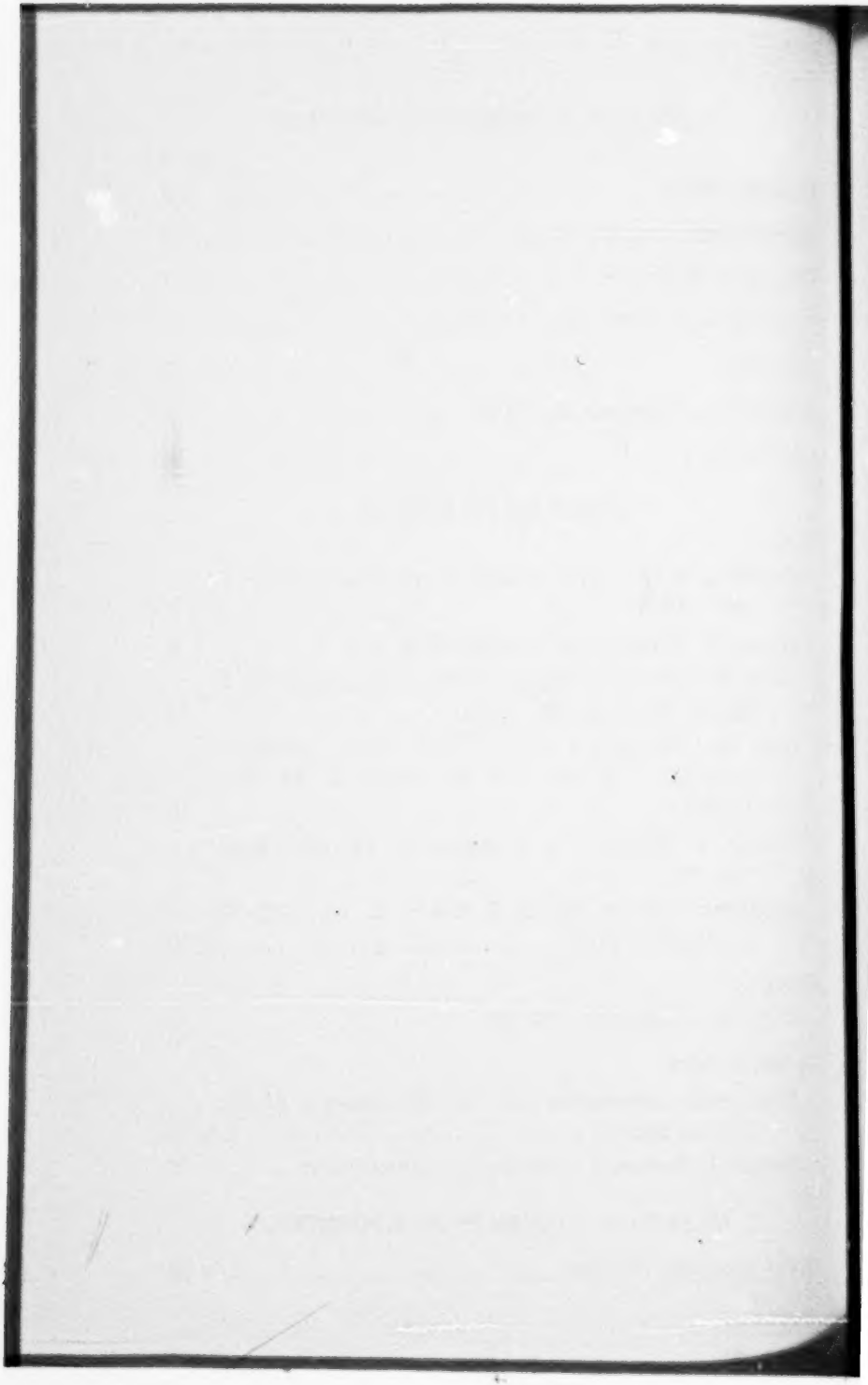

IN THE

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No.

LEONORA ROMANO, PASQUALE ROMANO and ROCCO CARUSO, Executors and Trustees of the Estate of Antonio Maglio, Deceased,

Plaintiffs,

LEONORA ROMANO,

Plaintiff-Petitioner,

vs.

LOUISE MAGLIO, et als.,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

LEONORA ROMANO, of 65 Park Avenue, Newark, New Jersey, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered in the above case on November 19, 1956.

OPINION BELOW.

The Supreme Court of the State of New Jersey did not render any opinion but it denied a petition for certification to review the opinion and judgment of the Appellate Division of the Superior Court of New Jersey, which opinion is reported in 41 N. J. Super. 561, 125 Atl. (2nd) 523.

JURISDICTION.

The judgment of the Supreme Court of New Jersey was made and entered on November 19, 1956, and a copy thereof is appended to this petition.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

The questions presented are:

1. What proof and what action by a court is necessary to construe a will and terminate rights in property in order to comply with procedural due process?

2. Is there a failure of procedural due process when a court enters a judgment based in part on matters outside the record?

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions which are relevant to the decision of this case are Section 1 of the Fourteenth Amendment of the United States Constitution and Article I, Section 1 of the Constitution of the State of New Jersey.

STATEMENT.

The petitioner, Leonora Romano, is one of the daughters of Antonio Maglio, and was one of three executors and trustees named in his Will, Article Eleventh of which provided:

> "I direct my Trustees to give first preference in the sale of any part or all of my real estate to my children" (P16a).

The Maglio will was the subject of litigation in the Chancery Division of the Superior Court of New Jersey in the year 1950, and by a judgment entered in that matter on March 24th, 1950, it was in part ordered:

> "The Trustees are hereby instructed that before they shall make sale of any real estate constituting an asset of the trust being administered by them, they shall afford to the children of the testator a reasonable opportunity to purchase the real estate for which an offer has been received at the price and upon the terms contained in such offer" (P20a-30 to P21a-3).

In 1952 the Executors instituted a suit in ejectment. A counter-claim was filed which among other things prayed for construction of Article Eleven of Mr. Maglio's will (P12a-14 to P13a-13). The suit was never tried but a settlement in connection therewith was entered into on Feb-

ruary 24, 1953, and on February 27, 1953, a final judgment was entered incorporating in substance the terms of the settlement.

Paragraph 6 of that final judgment provided in part as follows:

> "Any of the parties hereto shall have leave to apply to the court for further directions or relief at the foot of this judgment."

The property in the estate was not sold, and there was a further order of the court extending the time to sell said real estate (P58a-12-18). Still the property was not sold and proceedings were instituted to remove the original executors and trustees, and they were removed and the Howard Savings Institution was appointed substituted administrator c.t.a. and substituted trustee of the Maglio Will (P66a, P70a, P79a-23 to P86a).

Petitioner, who had been interested in acquiring the real estate, continued her negotiations with representatives of the Howard Savings Institution after its appointment as substituted administrator. In December of 1954, while these negotiations were going on the Howard without notice to Mrs. Romano, entered into contracts, the completion of which would dispose of all the real estate in the Maglio estate (P94a-8-25; P94a-10-22).

There is nothing in the record to indicate that the Howard in either of said contracts made any provision that said contracts were subject to the rights of the beneficiaries under Article Eleven of the Maglio will; nor did the Howard, in furtherance of the Chancery order of March 24, 1950, or in furtherance of the plain terms of Article Eleven of the will, give notice to Mrs. Romano or any of the other children, giving them an opportunity to purchase all or any part of the real estate on the same terms and conditions as to which they had entered into a contract to sell. On the contrary, the Howard merely filed a perfunctory petition as Adminis-

trator C. T. A. to sell real estate and secured an order to show cause thereon (P87a-10 to P97a).

This petition and order to show cause were mailed to Mrs. Romano on January 12, 1955 (P177a), but Mr. and Mrs. Romano had left their home early in the morning of January 13, 1955 (P119a-6). Consequently they were not at home to receive this mail and the mail was returned to the Post Office Department marked "Unclaimed", as was subsequent registered mail sent to Mrs. Romano (P119a-29 to P128a-2).

The return day of the order to show cause was continued to February 11, 1955, and at that time the only evidence presented to the court consisted of two affidavits by real estate men that the price set forth in the contract of sale represented the best price for the property, and an affidavit of mailing (P98a to P100a).

Without any testimony or consideration by the court, other than as to the value of the property, the court entered an order approving the sales and directing that they be made free from any lien or preference (P101a-31 to P102a-24).

After having endeavored to bring the matter to the court's attention in connection with an account filed by the substituted trustee (P104a), Mrs. Romano, on January 27, 1956, filed proceedings to set aside the judgment of February 11, 1955, and secured an order to show cause in connection therewith (P108a, P116a, P117a to P122a). On March 9th, 1956, on the return day of the order to show cause, there was a motion to strike the same as insufficient in law and the Chancery Court did strike the order to show cause (P162a to P164a).

In rendering its judgment of dismissal of March 23, 1956, the Chancery Court predicated said judgment in a large part upon an ex parte letter which a former attorney of Mrs. Romano had sent to the court (P166a to P170a).

The failure of due process of law was first raised by the

petitioner in her motion in the Chancery Division of the Superior Court of New Jersey, wherein she sought to set aside the judgment of February 11, 1955. She therein stated:

> "Wherefore, Leonora Romano moves the court to set aside and vacate nunc pro tunc the order of this court entered on February 11, 1955 * * * on the following grounds:
>
> "(a). The order is void because:
>
> * * * * * * * * * *
>
> "2. The constitutional requirements of due process of law were not complied with * * *" (P115a-10-2).

In the appeal to the Appellate Division of the Superior Court of New Jersey the petitioner also raised the issue of due process of law in two statements of questions involved in her brief which were as follows:

> "1. Does an appeal of right exist from a summary dismissal of a motion to vacate a judgment alleged to be void for lack of jurisdiction and lack of procedural due process?
>
> * * * * * * * * * *
>
> "4. What proof and what action by the court is necessary to construe a will and terminate rights in property where a party in interest does not appear, in order to comply with procedural due process?"

In the petitioner's petition for certification to the Supreme Court of New Jersey the statement of questions involved incorporated the issue of due process in the following:

> "1. What proof and what action by the court is necessary to construe a will and terminate rights in property in order to comply with procedural due process?
>
> "2. Has the requirement of procedural due process been violated when the court takes no proof and gives no thought or consideration to the terms of the con-

trolling portions of a will, and prior orders of the court, yet enters a judgment terminating property rights created by the will and protected by the prior orders of the court?

"3. Is there a failure of procedural due process when a court enters a judgment based in part on matters outside the record?"

The Appellate Division of the Superior Court of New Jersey, in its opinion in 41 N. J. Super. 561, 125 Atl. (2nd) 523, concluded that there had been no lack of due process by way of service upon Mrs. Romano because, first, the provisions of paragraph 6 of the judgment of the Chancery Division of the Superior Court of New Jersey of February 27, 1953, permitting the parties to seek further relief at the foot of the judgment, had not expired by the subsequent applications for relief and hence in this matter original service of process was not necessary, but the matter could be brought on by motion; and secondly, the Appellate Division concluded that because Mr. Hunoval, former attorney for Mrs. Romano, appeared in court on the return day of the order to show cause which resulted in the judgment of February 11, 1955, that presumptively he acted as her attorney and entered an appearance for her. That court also in its opinion considered and disposed of the question of failure of procedural due process in connection with whether the court, in rendering its judgment of February 11, 1955, was obliged to give due consideration to her rights under the will and to require proof in connection with whether the terms of the will and prior judgments of the Chancery Court had been complied with. The court disposed of this by saying it believes it was "contemplated, we think, that the children be afforded an opportunity to exercise their preference on the return day of the application" (41 N. J. Super. at page 574).

However, the Appellate Division of the Superior Court of

New Jersey did not in its opinion take up or consider in any way, but rather completely ignored, the issue as to whether or not there had been failure of due process as that issue was raised as to the judgment of the Chancery Division of the Superior Court of New Jersey of March 23, 1956. As to that judgment, it was claimed there was a failure of procedural due process because it was, in a large part, based on matters dehors the record.

The Supreme Court of New Jersey refused certification without writing any opinion or giving the reasons therefor (22 N. J. 574).

REASONS FOR GRANTING THE WRIT.

1. The Chancery Division of the Superior Court of New Jersey has rendered a judgment, extinguishing and terminating Mrs. Romano's rights under Article Eleven of her father's will. By the terms of that will she had a preferential right to purchase any or all of the real estate forming a part of the estate. Additionally, there existed a prior judgment of the Chancery Division of the Superior Court which required that before there was any sale of the real estate the testator's children should be given a reasonable opportunity to purchase the same on the terms and conditions offered by anyone else. Notwithstanding such property rights accorded by the will and reinforced by judgment of the court, the Chancery Court by its action and judgment of February 11, 1955, completely abrogate and terminate the rights of Mrs. Romano to purchase property of the estate as to which she had been negotiating. It did this without taking any proof as to what, if anything, had been done in furtherance of the preferential rights given by Article Eleven of the Maglio will, and without taking any proof or giving any consideration as to whether reasonable notice of the terms and conditions of an offer had been given

in accordance with the terms and directions of the judgment of the court of February 27, 1953.

We believe it is basic that if a court is to render a judgment, the effect of which is to terminate and dispose of property rights provided for in a will, supplemented by an existing order and judgment of the court, then it is necessary that there be a hearing and that the issue be presented to the court and that there be produced before the court facts upon which to render a judgment. In this case none of this was done and there was a complete failure of procedural due process. Such rights are protected by the *Fourteenth Amendment of the Constitution of the United States* and by *Article 1, Section 1* of the *New Jersey Constitution*. Such rights have been protected in similar circumstances by the courts of New Jersey. See *Hyman v. Muller*, 1 N. J. 124 (1948); *New Jersey Board of Optometrists v. Nemitz*, 21 N. J. Super. 18 (App. Div. 1952).

The protection of such rights has also been the basis for this court granting relief in other similar circumstances where state courts have failed to abide by procedural due process. See *Saunders v. Shaw*, 244 U. S. 317; 61 L. Ed. 1163; 37 S. Ct. 638 (1917).

2. The Chancery Division of the Superior Court of New Jersey, in rendering its judgment of March 23, 1956, dismissing Mrs. Romano's application to set aside the judgment of February 11, 1955, based its judgment of dismissal, in a large part, on information which it had secured in an ex parte letter received from Mrs. Romano's prior attorney. Mrs. Romano had never seen this letter and had never had an opportunity to refute it. A judgment so predicated on matters dehors the record clearly violates the fundamental requirement of due process of law.

The Supreme Court of New Jersey in the case of *Giordano v. City Commissioners of Newark*, 2 N. J. 585 (1949) at page 589, expressly held that a judgment resting in part

upon matters dehors the record, is a clear flouting of due process.

This court in *Saunders v. Shaw*, 244 U. S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), and in *Ohio Bell Telephone v. Public Utility Commission*, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093 (1939), held that the right to such a hearing was fundamental. This Court in the cited cases held that it is assured to every litigant by the *Fourteenth Amendment of the United States Constitution*, and there should be no compromise upon it for the sake of convenience, expediency or desire to be rid of a harassing matter.

3. When a state court fails in two particulars to grant due process of law which is guaranteed by the state constitution and by the constitution of the United States and in so doing does not even consider one of the issues of due process, then it is respectfully submitted that a litigant who has been deprived of property rights thereby has no other recourse but to apply to this court for relief. Even though the burdens of this court be heavy and many of the problems before it momentous, nevertheless it is respectfully submitted that the constitutional and inherent fundamental rights of individuals are worthy of the consideration of this court. This court of recent years has entertained many petitions where the civil rights of individuals were transgressed by a failure of procedural due process in state courts.

We respectfully suggest that property rights of individuals equally transgressed are entitled to equal attention and correction at the hands of this court.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted.

ROBERT V. CARTON,
Of Counsel for Petitioner.

Appendix

ORDER DENYING PETITION.

SUPREME COURT OF NEW JERSEY.

(Filed Nov. 19, 1956.)

LEONORA ROMANO, et al.,
Plaintiffs-Petitioners
vs.
LOUISE MAGLIO, et als.,
Defendants-Respondents.

On Petition for Certification. Order Denying Petition.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 19th day of November, 1956.

JOHN H. GILDEA,
Clerk of the Supreme Court.

A true copy.

JOHN H. GILDEA,
Clerk.

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FILED
MAR 20 1957
JOHN T. FEY, Clerk

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vs.

LOUISE MAGLIO, *et als.*,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF FOR RESPONDENTS.

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Plaintiffs,

LEONORA ROMANO,
Plaintiff-Petitioner,

v.

LOUISE MAGLIO, *et als.*,
Defendants-Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF FOR RESPONDENTS.

Questions Presented.

The questions presented are:

1. Should certiorari be granted if the petition therefor fails to clearly disclose (a) petitioner's reliance in the court below upon a specific provision of the United States Constitution, (b) a ruling adverse to petitioner thereon, and (c) that the order against which the petition is directed can not be sustained without such ruling?
2. Should the writ be granted if the petition does not present any federal questions the settlement of which is of public importance nor demonstrate any "special and important reasons" for granting it?

Jurisdiction.

The Petition is for Writ of Certiorari to the New Jersey Supreme Court, which did nothing in this case except deny a petition for certification, as is demonstrated by the appendix to the petition to this court. Thus the final judgment of the courts of the State of New Jersey became the affirmance by the Appellate Division of the Superior Court of New Jersey of the judgment of the Equity Division of the Superior Court of New Jersey.

The order of the New Jersey Supreme Court entered on November 19, 1956 denying with costs petitioner's petition for certification to the Appellate Division of the New Jersey Superior Court, as set forth in the Appendix of her petition for a Writ of Certiorari, does not state the reasons for its entry nor does her petition herein contain the opinion of said Appellate Division affirming the order of the Chancery Division of the New Jersey Superior Court entered March 23, 1956 denying her motion to set aside the Chancery Division order of February 11, 1955 approving the sale of Testator's real estate by respondent substituted fiduciary to respondent Ness. Thus an examination of the petition herein and of said New Jersey Supreme Court order fails to disclose whether said court or said Appellate Division considered any issue under the Constitution of the United States or within the scope of 28 U. S. C. 1257 (3) upon which jurisdiction is invoked.

The petitioner herein does not mention the United States Constitution or New Jersey Constitution or cite any specific provision of either of them as having been pre-

sented to the New Jersey courts in the case below for adjudication.

Page eight of said petition urges as the sole reason for granting a Writ of Certiorari petitioner's claim that said order of March 23, 1956 was based on matters dehors the record, without indicating or specifying such matters or to what extent they were relied upon by the court or necessary to its decision or were not disclosed to or known by petitioner with sufficient opportunity to present evidence controverting those matters.

Statement.

Petitioner, Leonora Romano, one of the daughters of Antonio Maglio and a beneficiary under his will, moved before the Superior Court of New Jersey, Chancery Division, to set aside an order entered by it on February 11, 1955, approving certain sales of his lands (P101a-P103a-14; P108a-127a). This motion was denied (P159a-P164a; P166a-P170a). She then proceeded to appeal from the order denying her motion, claiming that this order approving the sale was void because of a lack of jurisdiction over her and a denial of procedural due process.

On July 24, 1952, petitioner, her husband, Pasquale Romano, and Rocco Caruso, who were appointed by the Will as executors and trustees, commenced this action as an action in ejectment (P1a). Four other daughters, respondents herein, of the testator counterclaimed, demanding *inter alia,* that the court "take jurisdiction of the administration of his estate, that plaintiffs be removed as

trustees and that the Will be construed, particularly Paragraph Eleventh:

> "I direct my Trustees to give first preference in the sale of any part or all of my real estate to my children." (P5a-P13a).

Incidentally, this provision of the Will had been previously construed to a certain extent by the Chancery Division in *Forbringer* v. *Romano*, 7 N. J. Super. 432, 71 Atl. 2nd 660 (Ch. Div. 1950), aff'd on other grounds, 10 N. J. Super. 175, 76 Atl. 2nd 825 (App. Div. 1950). The judgment entered by the Chancery Division on March 24, 1950 contained the provision set forth on page 2 of the petition herein construing said Paragraph Eleventh.

On February 27, 1953, pursuant to a stipulation of settlement, subscribed by the parties individually and their respective attorneys (P44a-P46a) a final judgment was entered by consent on the complaint in ejectment and the counterclaim. The judgment (P47a-P48a) directed the trustees to sell "all of the real estate" left by the testator, within 90 days, as more fully specified in the judgment, and it further provided in Paragraph 6:

> "Any of the parties hereto shall have leave to apply to the court for further directions or relief at the foot of this judgment."

Thereafter, during the next 17 months, the counterclaimants, obviously proceeding under Paragraph 6 of the judgment, filed four petitions in the cause: Two of them leading to orders attempting to effect a sale of the lands (P51a-P57a; P59a-P65a); the third leading to orders removing the above mentioned executors and trustees for

malfeasance and adjudging them in contempt of court (P80a-P83a; P83a-P85a); and the fourth to an order entered July 29, 1954 appointing the Howard Savings Institution as substituted administrator with the Will annexed and substituted trustee, and also joining Petitioner, Mrs. Romano, and others, individually, as parties defendant to the counterclaim (she had theretofore been a party merely in her capacity as one of the executors and trustees (P85a, 86a; P72a to 76a, P66a to 70a).

Respondents Concetta Cirillo, Julia Forbringer, Louise Maglio and Rose Tarantino are daughters of testator and are four of the six primary beneficiaries having equal shares in the estate (P14a to 17a). Paragraph Fifth of the Will devised testator's real estate to his trustees with power to sell, convey and sub-divide (P14a-32) and did not give the beneficiaries, including petitioner, any property interest therein. The order of the Chancery Division of the New Jersey Superior Court entered July 29, 1954 appointing the Howard Savings Institution as the substituted fiduciary authorized it to sell and convey the property upon approval of the sale terms by the Court (P68a to 69a-17). The Chancery Division order of November 23, 1953 consented to by petitioner required court approval of all sales and the submission of acceptable offers to the court upon reasonable notice to all parties. The Chancery Division judgment of February 27, 1953 gave the beneficiaries two weeks at most after notice to submit matching offers (P47a to 49a, 77a, 78a). The petition herein on page three quotes Paragraph Eleventh of the Will and the interpretive clause in the Chancery Division Judgment of March 24, 1950, but cites no authorities holding that said paragraph gave the

beneficiaries any title to testator's real estate and makes no claim that said orders and judgments were not binding on petitioner.

The other respondents are bona fide purchasers for value and without notice of said real estate (P133a to 136a, 183a-17 to 185a), subsequent to the conveyance thereof on June 1, 1955 by respondent substituted fiduciary to respondent Ness pursuant to the Chancery Division order of February 11, 1955 (P101a to 103a), and in reliance upon the court records. Petitioner herein did not appeal from said order (P 86a-1 to 10) although she was actively represented by the same attorney, Joseph A. Hunoval, Esq., prior to and upon the entry of the orders of July 29, 1954 and February 11, 1955 (P101a-17, 187a to 190a). She had notice in December, 1954 of the intended sales of testator's real estate free of any claim by a beneficiary to a preference under the Will (P141a-17 to 142a-27, 149a-19 to 150a-9, 152a-20 to 154a, 177a to 182a, 188a-9 to 190a-7, 211a to 213a, D. R. 1a, 2a, 7a), and ample opportunity until February 11, 1955 in which to submit a matching offer or raise objections to the sale (P87a-10 to 103a-8). The petition for judicial approval of the sales described fully the realty to be sold and the prices to be paid therefor, recited the receipt of lesser offers, the terms of the order of July 29, 1954 and the first preference given by paragraph Eleventh of the Will to testator's children in the sale of his real estate and prayed for an order approving said sales free of such preference, thus notifying the court and the beneficiaries, including Mrs. Romano, of the exact relief sought and affording them an opportunity to meet the prices stated in the sale petition (P87a to 97a). Copies of said petition and of the order to show cause thereon were mailed to said

petitioner, her husband and her attorney (DR1a) as required by the court order (P88a).

On January 27, 1956, eleven-and-a-half months after entry of the order approving the sale of the lands, and after the lands had been improved by the erection of dwellings thereon, and after occupancy of such dwellings by innocent purchasers for value without notice, Mrs. Romano, the current petitioner, moved to set aside the order approving the sale, on the asserted grounds (1) that it is void as against her because she was not given notice of the application therefor, and (2) her hearsay assertion that her attorney, who had appeared in court, on two occasions before and once after February 11, 1955, on behalf of the executors, including herself, after they had been removed from office, on February 11th: "* * * appeared before the Court and advised that he had not been able to contact me in connection with the proceeding then before the Court and that he had no authority to speak for me in connection therewith." (P111a-15 to 19). Yet, indeed, the order of February 11, 1955, recites that the matter came on to be heard in the presence of himself as "attorney for" her (P101a-14 to 15).

Petitioner asserts (Pet. p. 5):

> "This petition and order to show cause were mailed to Mrs. Romano on January 12, 1955 (P177a), but Mr. and Mrs. Romano had left their home early in the morning of January 13, 1955 (P119a-6). Consequently, they were not at home to receive this mail and the mail was returned to the Post Office Department marked 'Unclaimed', as was subsequent registered mail sent to Mrs. Romano (P119a-29 to P128a-2)."

But the petitioner did not deny:

(1) That she and her husband during the litigation resided at 65 Park Avenue, Newark, N. J.

(2) That on January 14, 1955, J. Wallace Scanlon, Vice-President & Trust Officer of The Howard Savings Institution, by regular mail sent to Mrs. Leonora Romano, 65 Park Avenue, Newark 4, New Jersey, in response to her letter, dated January 12, 1955, wrote, *inter alia* (P150a-4):

> "Undoubtedly you have received by this time a notice to the effect that on January 28th there will be a hearing before Judge Sullivan regarding the proposed sale of real estate."

(3) That on January 28, 1955 the attorneys for said Institution sent by regular first class mail addressed to Mrs. Leonora Romano and to her husband Mr. Pasquale Romano at 65 Park Avenue, Newark, N. J., copies of said sale petition and order to show cause and notice of the adjournment of the hearing thereon from January 28 to February 11, 1955, and that said mail was never returned to said attorneys (P178a to 182a).

(4) The averments in the affidavit of her sister, Mrs. Rose Torantino, that on February 5, 1955, she visited petitioner in Hollywood, Florida, and discussed with her the petition and "order relating to the sale of my father's said property. * * * I returned home about two weeks after February 5, 1955 and then mailed to my sister Leonora at her address in Hollywood, Florida, the copy of said petition and order which had been mailed to my daughter Janice. The envelope in which said copy was mailed to my sister, Leonora, was addressed to her Hollywood Florida

address and I put my address in Manasquan as a return address. After mailing said envelope, I didn't get it back." (P142a-1).

Indeed, petitioner admitted that on March 2, 1955, she received a copy of the Order to Show Cause and Petition from her sister, who had previously informed her thereof (P153a-30 to P155a-30). Moreover with transparent naivete, in a letter, dated April 19, 1955, addressed to J. Wallace Scanlon, Trust Officer and a Vice-President of The Howard Savings Institution, petitioner, carefully avoiding all reference to the petition and Order to Show Cause, stated (P156a-30):

> "If any answers might have come from letters sent at times, they were astray and not concerning the point in regards to the questions that I wished to be answered in my letter to you."

Petitioner herein never denied her representation in the sale proceedings by her attorney, Joseph A. Hunoval, Esquire, nor charge him with any error and he subsequently filed her accounting in the same estate (DR2a-21 to 36). Her time to appeal from the sale order of February 11, 1955 expired 45 days thereafter under R. R. 1:3-1(b), 2:3, over two months prior to the conveyance on June 1, 1955 to respondent Ness. Her motion on January 27, 1956 as subsequently amended to set aside said order was made after respondents purchased portions of the premises sold to Ness. Said motion rested upon R. R. 4:6-2 which required it to "be made within a reasonable time," and was argued on March 9, 1956. In addition to evidence that the record of the sale proceedings raised no title questions, Judge Sullivan had before him on the hearing of her said motion

affidavits submitted on her behalf, her letter to Ennis about the sale petition (DR7a, 8a) and affidavits for respondents (P143a to 152a-14, 177a to 204a). If the report of petitioner's attorney, said Joseph A. Hunoval, Esq., about the circumstances attending his representation of her in the sale proceedings made at Judge Sullivan's request upon receiving Complaint from her, became a factor in the case, it was because petitioner's present attorney referred to and relied upon it in his argument on her motion as an excuse for her delay in making it (P206a to 214a, DR10a-15 to 26, 11a to 22a). In reliance upon the granting of her request to file further proof in support of her motion, additional affidavits were filed on her behalf (P152a-20 to 156a) which did not deny the facts set forth in Mr. Hunoval's said report or assert refusal by any one to furnish her with any evidence she desired. She made no application to take testimony or obtain depositions in support of her motion (P161a-20 to 33). More than a week elapsed between the filing of her last affidavits (P152a-20 to 153a) and the entry of the order of March 23, 1956 denying her motion (P166a to 168a), by reason of her laches and intervening equities in favor of innocent purchasers for value without notice of any claim by her to the premises acquired by them (P169a-13 to 170a-9) and of her failure to allege that she was ready, able and willing to match the price paid by the purchasers of the entire acreage, respondent Ness (P170a-15 to 20), which were among the reasons advanced by respondents to defeat her motion (DR3a to 6a). Judge Sullivan's opinion leaves no doubt that he predicated said order not on Mr. Hunoval's report to him but on the proof offered by respondents against the motion (P169a-12 to 24) and on the

aforesaid defect in her motion papers (P170a-16 to 25). The Appellate Division of the New Jersey Superior Court considered the validity of said order of March 23, 1956 on her motion for leave to appeal therefrom which was denied, on respondents' motion to dismiss her appeal and on her appeal. The Appellate Division in affirming said order disregarded Mr. Hunoval's said letter to Judge Sullivan and concluded that there was no merit to petitioner's contentions. 41 N. J. Super. 561, 572, 125 Atl. 2nd 523.

Petitioner's sole ground for Certiorari, as stated on page eight of her petition therefor, appears to be her claim that the Appellate Division, and presumably the New Jersey Supreme Court also, completely ignored the alleged dependence of the order of March 23, 1956 "on matters dehors the record." This claim appears to have been properly disposed of by Judge Clapp who said in his opinion for the Appellate Division at page 573, 41 N. J. Super.: "A party who seeks to have an order set aside must assume the burden of establishing facts warranting the relief. 7 Moore Federal Practice, 328 (2nd ed); 49 C. J. S. Judgments Par. 297. Mrs. Romano did not carry that burden here. It should be observed that a motion for relief from a judgment or order may be heard by the court on affidavits, R. R. 4:44-4, though usually where such a motion hinges upon a factual issue and credibility is involved, the court should, in the exercise of the discretion conferred by the rule, take oral testimony, Cf. 7 Moore, supra, 330. However, in this case in the face of the circumstances before the court, opposed merely by hearsay, we see no misuse of discretion." Petitioner did not appeal from the judgments of March 24, 1950 and February 27, 1953 or the orders of November 23, 1953, July 29, 1954 and February 11, 1955,

directing methods for selling testator's real estate and the exercise by the beneficiaries of their testamentary preference thereupon, and she failed to take advantage of her opportunity from December 1954 to March 23, 1956 to submit an offer matching that of respondent Ness or competent proof sufficient to challenge the evidence and record known to her and before the court.

Reasons for Denying Certiorari.

I.

This Court should not consider an appeal from a state court unless a substantial federal question exists, *Butler Bros.* v. *McColgan,* 315 U. S. 501, 86 L. Ed. 991, 62 S. Ct. 701 (1942), and such question arose in the state court and was there decided adversely to the party seeking certiorari. *Edwards* v. *Elliot,* 88 U. S. 532, 558, 22 L. Ed. 187, 21 Wall 532 (1874). Constitutional grounds not raised below should not be considered. *Young* v. *Masci,* 289 U. S. 253, 77 L. Ed. 1158, 53 S. Ct. 599 (1933), affirming *Masci* v. *Young,* 109 N. J. L. 453, 162 Atl. 623 (E. & A. 1932). The petition herein does not show that petitioner cited any specific clause of the United States Constitution to the New Jersey Courts as controlling or being involved in the issues below. Thus this court in dismissing a writ of error in *O'Neil* v. *Vermont,* 144 U. S. 323, 36 L. Ed. 450, 12 S. Ct. 693 (1892), said at page 366, 144 U. S.:

> "The Supreme Court of Vermont decided the case before us upon a ground broad enough to maintain its judgment without considering any Federal question. No federal question was presented for its de-

cision, as to this case, nor was the decision of a federal question necessary to the determination of this case, nor was any actually decided, nor does it appear that the judgment as rendered could not have been given without deciding one."

II.

Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between courts of appeal. "Special and important reasons," within the rule relating to granting Certiorari, relate to problems beyond the academic or episodic, especially where issues involved reach constitutional dimensions *Rice* v. *Sioux City Memorial Park Cemetary, Inc., et al.*, 349 U. S. 70, 99 L. Ed. 897, 75 S. Ct. 614 (1955). The petition herein presents no such circumstances.

The decisions cited in the petition involve cases where state commissions or courts decided issues on the basis of material evidence not shown on the record or disclosed to the parties or without a hearing at which the petitioner had an opportunity to present proof or controvert opposing evidence submitted on such issues. No such deviations from proper practice occurred in the case at bar or are disclosed by the petition. The ruling in *Saunders* v. *Shaw*, cited on page nine of the petition, does not apply where appellant had full opportunity to be heard on the issues which it raised. *Butler Bros.* v. *McColgan, supra.* As recognized in Federal and New Jersey Courts, the essential elements of "due process of law" as guaranteed by the

Fourteenth Amendment of the Federal Constitution, are appropriate notice of the judicial action and adequate opportunity to be heard and to controvert the evidence upon which the issue presented is to be decided. *Blackmer* v. *United States,* 284 U. S. 421, 76 L. Ed. 375, 52 S. Ct. 252 (1932); *Hyman* v. *Muller,* 1 N. J. 124, 129, 62 Atl. 2nd 221 (1948); *New Jersey State Board of Optometrists* v. *Nemitz,* 21 N. J. Super. 18, 28, 90 Atl. 2nd 740 (App. Div. 1952). The New Jersey Supreme Court applies the principles enunciated in *Ohio Bell Telephone* v. *Public Utility Commission* cited in the petition on page ten. *Mazza* v. *Cavicchia,* 15 N. J. 498, 514, 105 Atl. 2nd, 545 (1954); *In re Plainfield Union Water Co.,* 11 N. J. 382, 393, 94 Atl. 2nd 673 (1953). In denying petitioner's request for certification that court must have concluded that a violation of said principles had not occurred nor been disclosed in the case before it.

Here, petitioner, both as plaintiff in the initial ejectment suit and as defendant (in her representative capacity and individually) in the counterclaim, was already in the suit, subject to the jurisdiction of the court. Once a court has obtained jurisdiction in a cause through service of original process, a party has no constitutional right to demand notice of further proceedings in the cause.

Annotation: 52 L. R. A. (N. S.) 1161;

Pittsburgh, C. C. & St. L. R. Co. v. *Backus,* 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114;

12 Am. Jur. Constitutional Law, Sec. 602;

Collins v. *North Carolina State Highway & Public Works Commission,* 237 N. C. 277, 74 S. E. 2d. 709 (N. C. Sup. Ct. 1953).

In the latter case the court stated at page 714, "The notice required by these rules of procedure is hereinafter called procedural notice to distinguish it from constitutional notice required by the law of the land and due process of law."

Here, the counterclaim, having sought the court's continuous jurisdiction in the administration of the Estate of Antonio Maglio, deceased, was in the nature of and part of the probate proceeding. A probate proceeding being an *in rem* proceeding, charges all the world with notice. Petitioner, having voluntarily appeared seeking relief, represented by counsel, was no longer constitutionally entitled to actual notice of subsequent procedural steps.

Ro Bards v. *Lamb,* 127 U. S. 58, 32 L. Ed. 60, 8 S. Ct. 1031;

Goodrich v. *Ferris,* 214 U. S. 71, 53 L. Ed. 914, 29 S. Ct. 580 (1909);

Miedrich v. *Lauenstein,* 232 U. S. 236, 58 L. Ed. 584, 34 S. Ct. 309;

Grannis v. *Ordean,* 234 U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 779;

Mullane v. *Central Hanover Bank & T. Co.,* 339 U. S. 306, 39 L. Ed. 865, 70 S. Ct. 652;

In re Moody's Estate, 115 Vt. 1, 49 A. 2d 562, cert. den. 331 U. S. 814, 91 L. Ed. 1833, 67 S. Ct. 1201;

Michigan Trust Co. v. *Ferry,* 228 U. S. 346, 33 S. Ct. 550, 57 L. Ed. 867;

Louisville & Nashville Rd. Co. v. *Schmidt,* 177 U. S. 230, 237, 20 S. Ct. 620, 44 L. Ed. 575;

It being undenied that original jurisdiction over petitioner had been acquired by the court, the rights of inno-

cent purchasers for value without notice of petitioner's claim of lack of notice of subsequent procedural steps, are entitled to equitable priority.

Grignow's Lessee v. *Astor*, 43 U. S. 319, 340-342;
Simmons v. *Saul*, 138 U. S. 439, 454-455;
Compare: *Nelson* v. *The City of New York*, 352 U. S. 103, 108-109, 77 S. Ct. 195 (1956).

Petitioner, having waited until innocent purchasers for value without notice of her subsequent claim that she failed to receive notice of a procedural step subsequent to original process, who had improved the lands, is estopped from attacking their rights thereto:

Robbins v. *City of Jersey City*, 23 N. J. 229, 237 (1957);
Summer Cottagers' Ass'n. of Cape May v. *City of Cape May*, 19 N. J. 493, 119 Atl. 2nd 585 (1955).

Conclusion.

For the reasons set forth above it is submitted that the Petition for Writ of Certiorari should be denied.

HARRY V. OSBORNE, JR.,
Counsel for Respondents.